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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1930.

No. 16.

STATE OF FLORIDA and A. S. WELLS, E. S. MATHEWS, et al.,
Appellants,
v.
UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al.,
Appellees.

No. 17

BROOKS-SCANLON CORPORATION, WILSON CYPRESS COMPANY, and CUMMER CYPRESS COMPANY,
Appellants,
v.
UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al.,
Appellees.

No. 18.

WILSON LUMBER COMPANY OF FLORIDA,
Appellant,
v.
UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al.,
Appellees.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

APPELLANTS' MEMORANDUM UPON THEIR OBJECTIONS TO THE FILING OF THE MOTIONS OF THE ATLANTIC COAST LINE RAILROAD COMPANY AND GEORGIA PUBLIC SERVICE COMMISSION TENDERED FOR FILING JANUARY 23, 1931, AND TO THE ISSUANCE OF THE RULE THEREBY SOUGHT.

For the Appellants in Nos. 16, 17, and 18.
STATE OF FLORIDA, et al.,
BROOKS-SCANLON CORPORATION, et al.,
WILSON LUMBER COMPANY OF FLORIDA.
FRED. H. DAVIS,
T. T. TURNBULL,
HENRY P. ADAIR,
CHARLES E. COTTERILL,
AUGUST G. GUTHEIM,
H. PLANT OSBORNE,
J. V. NORMAN,
Solicitors.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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The Atlantic Coast Line Railroad Company (appellee here, intervener in the District Court below, and *defendant* in the late proceeding before the Interstate Commerce Commission), and the Georgia Public Service Commission (appellee here, intervener in the District Court below and *complainant* in the late proceeding before the Interstate Commerce Commission) tendered for filing in this Court on or about January 23, 1931, their respective motions praying that the Court stay its mandates in the foregoing causes or that it so shape its mandates that the District Court may have authority to continue in effect the intrastate rates prescribed by the Interstate Commerce Commission by the order of that Commission which this Court by its decree has ordered set aside.

The appellants *in limine* objected and do object to the filing of the motions in question and to the issuance of the rule sought by such motions for the reasons hereinafter set forth, viz:

(a) Because the matters of fact set forth in such motions respectively, if true, are insufficient to warrant the relief sought by the motions.

(b) Because to grant the relief prayed by the motions respectively would be to continue in force and effect the intrastate order of the Interstate Commerce Commission which, by the opinion and judgment of this Court, has been condemned and ordered set aside.

(c) Because the motions respectively seek to lay the foundation for the entry in future proceedings before the Interstate Commerce Commission of a retroactive order superseding state rates now lawfully in force and effect.

(d) Because the relief sought by the motions re-

spectively is in its essence an injunction restraining the operation and effectiveness of purely state rates prior to and pending proceedings hereafter to be instituted and prosecuted before the proper administrative tribunal, attacking such state rates.

(e) Neither the United States of America nor the Interstate Commerce Commission has joined in the motions of the appellees or filed motions of any kind in this Court since the coming down of the opinion.

The foregoing grounds all involve substantially the same principles of law and so will be discussed together.

ARGUMENT.

NEW FACTS ASSERTED BY THE MOTIONS.

No new facts are alleged by the Motions except those in paragraph 4 of the Railroad Company's Motion (which is adopted by the Motion of the Georgia Public Service Commission). Those new facts show (if true) that since the unjustified and unjustifiable order of the Interstate Commerce Commission became effective certain of the appellant lumber companies ceased shipping logs over the lines of the Railroad Company, whereas others of them have continued to ship logs. Thus the motions illustrate the application of the principle laid down in the opinion of the Court in this case that "the raising of rates does not necessarily increase revenue. It may in particular localities reduce revenue instead of increasing it by discouraging patronage." This Florida Log Rate case aptly demonstrates the accuracy of the view of the Court expressed in the language just quoted.

THE EXISTENT JUDGMENT OF THIS COURT.

This Court in its opinion in these cases, in discussing the authority exercised by the Interstate Commerce Commission, said among other things:

> "The propriety of the exertion of the authority must be tested by its relation to the purpose of the grant and with suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of state power, *the justification of the exercise of the federal power must clearly appear.* (Italics ours.)

And this Court examined the order and report of the Interstate Commerce Commission and held, in effect, that the findings of the Commission were not such as to justify the exercise of the federal power and so declared that the order of the Interstate Commerce Commission with respect to intrastate rates must be set aside and reversed the decrees of the court below.

And so on January 5, 1931, pursuant to the opinion of this Court, a formal order was entered in each of the three cases in which, among other things

> "It is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby, reversed, and that the portion of the order of the Interstate Commerce Commission under review in this Court, with respect to intrastate rates, be set aside. * * *"

Then follows the portion of the order remanding the causes respectively to the District Court for fur-

ther proceedings in conformity with the opinion of this Court.

No petitions for rehearing have been filed by anyone.

THE EFFECT OF THE RELIEF SOUGHT BY THE MOTIONS.

What the Railroad Company and the Georgia Public Service Commission seek by the motions is to have this Court undo the thing which by its judgment it has done. They seek by an order of this Court to enforce within the domain of state power an order of the Interstate Commerce Commission condemned by this Court and which the judgment of this Court decreed be set aside.

The effect of the relief prayed, if granted, would be to enjoin (pending proceedings hereafter to be instituted and prosecuted before the Interstate Commerce Commission) the application of a state rate found by this Court in its opinion (page 7) to have been "maintained in intrastate commerce subject to the authority of the state and * * * published as required by its laws" and the injunction is not sought because the state rate is confiscatory but is based solely upon the opinion of the movants that at some future time the Interstate Commerce Commission will make findings and orders which will justify the exercise of the federal power within the domain of the state.

THE AUTHORITIES CITED BY THE MOVANTS.

The Movants cite Section 377 of Judicial Code, 1928 and three decisions of this Court in support of their

Motions. The cited section of the Statute and two of the decisions, to wit, *Ex Parte The Milwaukee Railroad Co.*, 5 Wall. 188, and *Watts, Watts & Co. v. Unione Austriaca,* 248 U. S. 9, 21, clearly have no application here. The cited sections of the statutes and those two decisions relate to the power of this Court to make orders *in the exercise of its appellate jurisdiction.* The thing in issue in the Court below and in the case at Bar was the validity of the order of the Interstate Commerce Commission invading state domain and prescribing state rates state-wide and without exception. This Court found that order not justified by the Commission's findings. It is obvious that neither the appellate jurisdiction of this Court nor the jurisdiction of the Court below comprehends jurisdiction to exercise *pendente lite* or otherwise administrative power to supply the essential findings (absent from the Commission's order) or to prescribe *pendente lite* or otherwise a rate for application in intrastate commerce. See *Mitchell Coal & C. Co. v. Pennsylvania R. Co.,* 230 U. S. 247, 255; *Kansas City S. R. Co. v. United States,* 231 U. S. 423, 439, 440; *Louisville & N. R. Co. v. United States,* 238 U. S. 1, 15, 16. The other case cited by Movants, *Smith v. Illinois Bell Telephone Co.,* decided December 1, 1930, U. S. Sup. Ct. Advance Opinions 1930-1931, Vol. 3, pages 99-112, likewise presents wholly different matters of law and fact.

The *Telephone case, supra,* was an appeal from a final decree of the District Court of the United States for the Northern District of Illinois enjoining the enforcement of an order by the Illinois Commerce Commission which prescribed rates for telephone service in the City of Chicago. The bill of complaint

attacked the order of the Illinois Commission upon the ground that the rates prescribed were confiscatory. An interlocutory decree enjoining the enforcement of the state order was entered and, on final decree, the interlocutory injunction was made permanent. This Court reversed the final decree and remanded the cause to the District Court for further consideration and, pending the further proceedings of the Court below, continued the *restraining order* entered in the suit by the Court below.

It is obvious that the Telephone case has no application here. The issue there was whether the rates were *confiscatory* and in violation of the due process clause of the Fourteenth Amendment. That issue was one which the courts alone could determine and not one in any wise committed to an administrative board or body of the federal government. This Court did not determine whether there had been a violation of the Fourteenth Amendment but remanded the cause to the Court below with directions to *that court* to make certain findings and apply certain rules in determining that issue. And the Court below, having entered *pendente lite* a temporary restraining order to be effective until the final determination of the suit, it was natural and fitting that this Court, having set aside the final decree for further proceedings on the merits, should continue in effect the temporary restraining order.

THE BOARD OF COMMISSIONERS OF NORTH DAKOTA V. GREAT NORTHERN RAILWAY CO., 281 U. S. 412, 74 L. ED. 936.

The *North Dakota case, supra,* would seem to be conclusive of the case at bar. There the appeal was

from an order of a United States District Court enjoining the enforcement of an order of the North Dakota State Board of Railroad Commissioners prescribing intrastate rates pending the determination by the Interstate Commerce Commission of the rates thus prescribed which caused an undue or unreasonable discrimination against interstate commerce.

The North Dakota Commission had made an order prescribing intrastate class rates. When that order was made there were then pending before the Interstate Commerce Commission two proceedings involving North Dakota intrastate class rates, the one the general investigation under the Congressional Joint Resolution of January 30, 1925 (43 Stat. L. 801, Chap. 120) in which the appellant Board was then cooperating, and the other a complaint filed before the Interstate Commerce Commission by the appellee carriers alleging that the new state rates would unjustly discriminate against persons and localities in interstate commerce and would constitute an unreasonable burden on interstate commerce in violation of Section 13 of the Interstate Commerce Act. The appellee carriers then instituted suit in the United States District Court and demanded and obtained an interlocutory injunction restraining the State Commission and officials from putting into effect the state rates until the Interstate Commerce Commission had determined in the pending or other appropriate proceeding before it the issue of unjust discrimination against interstate commerce. This Court on the appeal from the interlocutory injunction (p. 420) pointed out that there was no contention that the state rate was confiscatory and that the attack upon it was upon its alleged effect upon interstate commerce. This Court

then examined the laws of Congress and its own decisions respecting the exercise of federal power within the domain of the state, commencing with the *Minnesota Rate Cases,* 230 U. S. 352, and thence forward, and determined from them:

(a) That no attack upon a state rate can be maintained in the Courts upon the ground of interference with interstate commerce (pending proceedings by the Interstate Commerce Commission or otherwise) until appropriate findings and orders with respect to that state rate have been made by the Interstate Commerce Commission.

(b) That even the Interstate Commerce Commission has no power to suspend a state rate pending proceedings before that body or otherwise (Text 429-430).

In concluding its opinion in the *North Dakota case* this Court said (Text 430):

> "It is said that the interlocutory injunction, granted below, was in aid of the proceedings pending before the Interstate Commerce Commission. But the injunction necessarily has the effect of preventing the state from enforcing the rates it has prescribed, which are lawful rates until the Interstate Commerce Commission finds that they cause an unjust discrimination against interstate commerce. A judicial restraint of the enforcement of intrastate rates, although limited to the pendency of proceedings before the Interstate Commerce Commission, is none the less essentially a restraint upon the power of the state to establish rates for its internal commerce, a power the exercise of which in prescribing rates otherwise valid is not subject to interference upon

> the sole ground of injury to interstate commerce, save as Congress has validly provided. Congress has so provided only in the event that, after full hearing in which the state authorities may participate, the Interstate Commerce Commission finds that unjust discrimination is created. Congress forbids the unjust discrimination through the fixing of intrastate rates but entrusts the appropriate enforcement of its prohibition primarily to its administrative agency.
>
> "It is urged that the restraining power of the court is needed to prevent irreparable injury. But, in this class of cases, the question whether there is injury, and what the measures shall be to prevent it, is committed for its solution preliminarily to the Interstate Commerce Commission." Board of R. Comrs. v. Great Northern R. Co., 281 U. S. 412, 430.

And so this Court remanded the cause to the Court below with instructions to dismiss the Bill.

The principles of law laid down in the *North Dakota case, supra,* meet every problem presented by the Motions in the case at Bar.

CONCLUSION.

The thing attacked in the Court below and in this Court was not the State rate but the order of the Interstate Commerce Commission which invaded the domain of the State. This Court by its opinion and judgment has declared that the findings of the Commission fail to justify the invasion of State domain, and has adjudged and decreed that the Commission's order respecting intrastate rates be set aside. The judgment of this Court finally disposes of the order. What, if any, proceedings may hereafter be had before, or orders made by the Commission are matters within

the administrative discretion of the Interstate Commerce Commission "acting in accordance with the authority conferred by the statute," and are not within the province of the Courts. And while under the *North Dakota case, supra,* the pending of such proceedings before the Commission makes no difference, we may note in passing that no such proceedings are now pending and neither the United States nor the Interstate Commerce Commission has in any way indicated to this Court that such will be had.

For the reasons hereinabove set forth we are confident that this Court will not undo what it has done or continue by its mandate the unlawful order of the Commission and thus in effect enjoin the operation and effectiveness of the State Rate, found by the Court to be maintained subject to State authority.

Respectfully submitted,

For the Appellants in Nos. 16, 17, and 18.
STATE OF FLORIDA, ET AL.
BROOKS-SCANLON CORPORATION, ET AL.
WILSON LUMBER COMPANY OF FLORIDA.

FRED H. DAVIS,
T. T. TURNBULL,
HENRY P. ADAIR,
CHARLES E. COTTERILL,
AUGUST G. GUTHEIM,
H. PLANT OSBORNE,
J. V. NORMAN,
Solicitors.

January 26, 1931.

SUPREME COURT OF THE UNITED STATES.

Nos. 16, 17 and 18.—October Term, 1930.

The State of Florida, and A. S. Wells, E. S. Matthews, et al., etc., Appellants,
16 *vs.*
The United States of America, Interstate Commerce Commission, et al.

Brooks-Scanlon Corporation, Wilson Cypress Company, Cummer Cypress Company, Appellants,
17 *vs.*
The United States of America, Interstate Commerce Commission, et al.

Wilson Lumber Company of Florida, Appellant,
18 *vs.*
The United States of America, Interstate Commerce Commission, et al.

Appeals from the District Court of the United States for the Northern District of Georgia.

[January 5, 1931.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The State of Florida and the members of its Railroad Commission (appellants in No. 16) brought suit in the District Court to restrain the enforcement of that part of an order of the Interstate Commerce Commission which dealt with certain intrastate rates of the Atlantic Coast Line Railroad Company in Florida. The order, made August 2, 1928, required the Railroad Company to establish carload rates for logs (except walnut, cherry and cedar) in intrastate commerce "within the State of Florida" which should be the same as the rates prescribed by the Interstate Commerce Commission as reasonable for transportation in interstate commerce from points in the northern portion of Florida to destinations in Georgia. The order in that respect was assailed as

being outside the scope of the issues raised in the proceeding in which the order was entered and without substantial evidence to support it, and as extending beyond the statutory authority of the Commission and the limits of federal power under the Constitution.

Suits for similar relief were brought by the Brooks-Scanlon Corporation and other corporations (appellants in No. 17) and by the Wilson Lumber Company (appellant in No. 18), manufacturers and shippers of lumber in Florida. The Public Service Commission of Georgia was permitted to intervene, and the three suits were consolidated and heard before a court of three judges as required by the applicable statute.

The court was of the opinion that the order of the Commission touching intrastate rates could be construed as being limited to points of origin on the Atlantic Coast Line Railroad in the northern part of Florida, as the Commission had confined its order to these points of origin in fixing interstate rates. Taking the view that, if construed so as to apply to intrastate rates throughout the State, the order would probably be invalid, the court sustained it upon the narrower construction. Decrees were entered accordingly in January, 1929, dismissing the bills. 30 Fed. (2d) 116.

Thereupon the Interstate Commerce Commission amended its order by inserting additional exceptions of logs, and also with respect to intrastate rates, "for the purpose of clarification", by substituting for the phrase "within the State of Florida" the words "within and throughout the entire State of Florida, without exception." Petitions for rehearing and for leave to file supplemental bills were then presented to the District Court and were granted. The Atlantic Coast Line Railroad Company was allowed to intervene. On the rehearing, both the original and supplemental bills were dismissed. 31 Fed. (2d) 580. The court upheld the amended order of the Commission as to intrastate rates, in its statewide operation, not "because of undue prejudice to shippers and localities, or because of undue discrimination against the *particular* interstate commerce" in the described logs, but solely upon the ground that the order was aimed at a discrimination "against *general* interstate commerce", caused by intrastate rates which were so low as to throw an undue burden upon the interstate revenues of the carrier.

From the decrees entered accordingly the present appeals are brought.

The proceeding before the Interstate Commerce Commission was begun by the filing of a complaint by the Georgia Public Service Commission against the Atlantic Coast Line Railroad Company. The complaint stated that its object was to secure reasonable rates on logs from points on the Railroad Company's line within Florida to all destinations on its line in Georgia, and to remove any unjust discrimination found to exist as provided in the Interstate Commerce Act. The complaint alleged that there was competition between mills and consumers in Georgia and those in Florida in the purchase and transportation of logs from points in Florida to destinations in Georgia. The intrastate log rates of that railroad in Florida, and its interstate log rates between Florida and Georgia, for distances up to 170 miles were set forth, and it was alleged that the interstate rates greatly exceeded the intrastate rates for like distances upon traffic moving under substantially similar conditions. The complaint charged that the interstate rates were unjust and unreasonable in violation of section 1, were unjustly discriminatory in violation of section 2, and were unduly prejudicial to the interstate shipper and preferential in favor of the intrastate shipper in violation of section 3, of the Interstate Commerce Act. It was also charged that the carrier's intrastate rates in Florida gave unreasonable preference to intrastate shippers in that State and were unduly prejudicial to interstate shippers in Georgia, causing an unjust discrimination against interstate commerce in violation of section 13 of the Act. The complainants asked for an order requiring the Atlantic Coast Line Railroad Company to desist from the described violations of the Act, and prescribing just, reasonable, and non-discriminatory interstate rates to be charged by the defendant carrier for the transportation of carload shipments of logs from all Florida points to all destinations in Georgia, and that the measure of such rates should be no higher than those concurrently in effect for the same kind of property moving in intrastate commerce in Florida.

The State of Florida was notified of the proceeding, and the Florida Railroad Commission appeared in defense of the Florida intrastate rates. There were a number of intervenors, including shippers of logs in intrastate commerce in Florida, Georgia lumber